Supreme Court, U.S.
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NO. 89-1761

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TROY D. BARNETT, ET AL.

Petitioners,

v.

PETRO-TEX CHEMICAL CORPORATION

and TENNECO, INC.,

Respondents.

PETITIONERS' REPLY BRIEF

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REPLY ARGUMENT

Respondents' Brief in Opposition misdirects this Court's attention from the crucial issue in this case. Petitioners have not and do not claim that the use of the term "et al." in a notice of appeal can constitute effective notice of "the party or parties taking the appeal," as required by Rule 3(c), Fed. R. App. P. Indeed, as Petitioners acknowledged in their Petition for Writ of Certiorari on page 6, that issue has been conclusively eliminated by *Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405 (1988). Nor do Petitioners contend that a form for appearance of counsel, standing alone, can be an adequate substitute for a notice of appeal. Instead, the issue is whether a timely filed form for appearance of counsel (or, for that matter, any timely filed document) can be considered *in conjunction with* a timely filed notice of appeal in determining whether the requirements of Rule 3(c) have been met. Stated another way, is there anything in the rules that directs the court to ignore the fact that a subsequent document, also timely filed, contains all the essential, missing information necessary to identify "the party or parties taking the appeal"?

In *Torres*, this Court instructed that the requirements of Rule 3(c) are met "if the litigant's action is the functional equivalent of what the rule requires." 108 S. Ct. at 2049. Surely, the filing of a notice of appeal whose only defect is its failure to identify all of the appellants included in the designation "et al.," followed by the filing of Petitioners' form for appearance of counsel, which references the judgment appealed from and specifically defines the term "et al." and identifies each of the parties bringing the appeal, is "the functional equivalent of what the rule requires." Any other interpretation would be contrary to both the spirit and the letter of the federal rules.

This is not a situation where the form for appearance of counsel, standing alone, is defective as a notice of appeal, a distinction that has escaped Respondents. In contrast to the cases cited in Respondents' Brief in Opposition, Petitioners are not asking this Court to consider the form *in lieu of* a notice of appeal, but *in addition* to such notice. Nor is this a case where the Court is precluded from considering a document which might have sufficed to meet the requirements of Rule 3(c), but was filed out of time. Here, both documents Petitioners are asking the Court to consider were filed within the 30 day period designated by Rule 4(a)(4), Fed. R. App. P., for noticing an appeal.

Taking all these factors into consideration, there is simply no basis for the Fifth Circuit's decision to disregard a document filed on time that clears up any ambiguity concerning the identity of the parties in the prior filed notice of appeal. Nothing in the rules nor this Court's decisions can be interpreted to dictate that result. If all a court can consider is a single piece of paper, then this Court should instruct litigants to disregard the language in *Torres* that permits compliance in any other manner and simply advise parties that the narrow, rigid reading of Rule 3(c) employed by the Fifth Circuit and the Seventh Circuit will henceforth be the test for determining the validity of a notice of appeal. *See Allen Archery, Inc. v. Precision Shooting Equip.*, 857 F.2d 1176 (7th Cir. 1988). Otherwise, courts will continue to issue inconsistent rulings, as evidenced by the recent cases from the Second Circuit and the D.C. Circuit regarding the parameters of Rule 3(c) and what constitutes effective notice. *See Al-Jundi v. Estate of Rockefeller*, 885 F.2d 160 (2d Cir. 1989); *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881 (D.C. Cir. 1987).

The latest opinion from the Fifth Circuit, a case decided since Petitioners' Petition for Writ of Certiorari was filed, only

adds to the confusion of this area of the law.[1] In *Birdsong v. Wrotenbery*, 901 F.2d 1270, appellants attempted to convert a "Stipulation to Include Omissions from the Record" and a "Motion to Supply Omissions in the Record" into a timely filed notice of appeal. In contrast to the decision in this case, however, in *Birdsong*, the Fifth Circuit indicated its willingness to consider other timely filed appeal papers in determining whether the specific requirements of Rule 3(c) had been met. The court concluded, "[t]hese two documents taken individually or *coupled together* fail to satisfy any one of the three elements required under Rule 3(c)." *Id.* at _____. In *Birdsong*, not only was the "et al." designation of the parties left unexplained, but neither document referenced the judgment or order from which the appeal was taken. The court concluded that the failure to satisfy the simple requirements of Rule 3(c) led to the demise of the appeal. And yet, the clear implication of the Fifth Circuit's opinion in *Birdsong* is that had the documents contained all the essential information required for noticing an appeal, the court could have viewed this as substantial compliance with the technical requirements of Rule 3(c) and the "functional equivalent" of a notice of appeal. It cannot be overemphasized that the two appeal papers in the instant case, taken together, *did* contain all the essential information required by the rule and were timely filed.

Respondents' brief cites a number of new cases; however, none of these cases address the one issue facing this Court. Instead, the cases cited by Respondent, without exception, deal with issues that have no bearing on the fact situation

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1/ Petitioners are mindful of Respondents' argument regarding their failure to move for rehearing *en banc* before the Fifth Circuit. As Respondents are no doubt aware, however, the Fifth Circuit, by express policy, strongly disfavors suggestions for rehearing *en banc* and cautions counsel against its use.

or question raised in this case. This is best demonstrated by the parenthetical descriptions used by Respondent to explain the holding in each case. *See* Respondents' Brief in Opposition at 8-9. Without repeating these references, suffice it to say that all of Respondents' cases deal with the insufficiency of the "et al." designation and the jurisdictional bar to considering any document not filed within the time required by the rules.

Although there is no discussion of these cases, Respondents do include a quotation from one case, *Cruz v. Melendez*, 902 F.2d 232 (3d Cir. 1990), for the proposition that another circuit has rejected Petitioners' argument that a form for appearance of counsel can be considered along with a notice of appeal:

> We reject plaintiffs' argument that the appearance form filed by counsel on January 12, 1990 satisfies the requirements of Rule 3(c) because counsel named all plaintiffs individually, rather than using the "et al." designation. First, this argument is inconsistent with the court's strict interpretation of Rule 3(c) found in *Torres* ... .

Cruz, 902 F.2d at _____; Respondents' Brief at 10. Respondents' quotation, however, ends too soon. Indeed, in the very next sentence of that opinion, the court specifically states that the form for appearance of counsel cannot be considered *because it "was filed after the 30 day time limit* for a notice of appeal"[2] *Id.* This is

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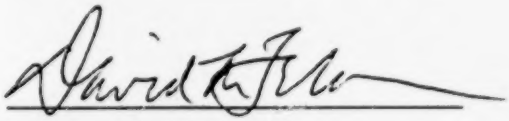
2/ Likewise, the simple fact that the form for appearance of counsel was filed outside the 30 day deadline was also the reason for its rejection in the Sixth Circuit case cited by Respondent and included in the appendix to its brief. *Police Officers for Equal Rights v. City of Columbus, Ohio*, 871 F.2d 1088 (6th cir. 1989). By referring to this case, Petitioners are not condoning Respondents' use of an unpublished opinion as authority, a practice clearly prohibited by the rules.

obviously a crucial distinction.

For the foregoing reasons and those previously set forth, Petitioners respectfully ask this Court to grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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